

# The Burger Court Opinion Writing Database

## *Abney v. United States*

431 U.S. 651 (1977)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Burger  
Mr. Justice Powell

From: The Chief Justice

Circulated: MAY 18 1977

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1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75-6521

Donald Abney, Larry Starks and	On Writ of Certiorari to the
Alonzo Robinson, Petitioners,	
v.	
United States.	United States Court of Appeals for the Third Circuit.

[May —, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U. S. C. § 1291,<sup>1</sup> and thus immediately appealable. If it is a final decision, we must also decide: (a) whether the Double Jeopardy Clause bars the instant prosecution; (b) whether the courts of appeals have jurisdiction to consider non-double jeopardy claims presented pendent to such appeals; and if so, (c) whether the Court of Appeals erred in refusing to dismiss the indictment on the alternative grounds asserted by the petitioners.

(1)

In March 1974, a single-count indictment was returned in the United States District Court for the Eastern District of Pennsylvania charging petitioners, Donald Abney, Larry

<sup>1</sup> Section 1291 provides as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 15, 1977

Re: Cases held for 75-6521 - Abney v. United States

MEMORANDUM TO THE CONFERENCE:

(1) 75-1892 - United States v. MacDonald:

Resp was charged with the murder of his wife and two infant daughters. The killings occurred in 1970 while resp, then a captain in the army, was stationed at Fort Bragg, North Carolina. The army brought criminal military charges against the resp. These charges were later dropped and resp was discharged from the army.

In 1975, after further investigation, a federal grand jury indicted resp for the murders. Prior to trial, resp moved to dismiss the indictment on double jeopardy and speedy trial grounds. The District Court denied the motion and resp appealed. CA 4 held that the denial of the motion constituted a final decision within the meaning of 28 U.S.C. § 1291. From its opinion it is difficult to determine whether it found the speedy trial claim appealable independently or only as pendent to the double jeopardy claim. There is language, however, strongly suggesting that the former was the case. The Court went on to find that the prosecution was barred by resp's right to a speedy trial; it did not reach the double jeopardy claim.

After Abney, resp's Sixth Amendment claim was immediately appealable only if it falls within Cohen's collateral order rule; Abney rejected the notion of pendent jurisdiction in this context. Of course, Abney does not answer that question since the opinion was confined to double jeopardy claims. Because I believe that the appealability of speedy trial claims is an important question that this Court should resolve, I will vote to grant the SG's petition for cert.

X

11  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 24, 1977

Re: 75-6521 Abney v. United States

MEMORANDUM TO THE CONFERENCE:

We find an "ambiguity" in the dispositive paragraph of the opinion which currently reads as follows:

"Accordingly, the judgment of the Court of Appeals is affirmed."

In light of the fact that we affirmed the Court of Appeals only insofar as it rejected the petrs' double jeopardy claim, it should read:

"Accordingly, the judgment of the Court of Appeals is affirmed in part and vacated in part."

Absent dissent, Mr. Putzel will make this change.

Regards,

WRB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 26, 1977

RE: No. 75-6521 Abney v. United States

Dear Chief:

I agree.

Sincerely,

*Bill*

The Chief Justice

cc: The Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 17, 1977

No. 75-6521 - Abney v. United States

Dear Chief,

I am glad to join your opinion for the  
Court in this case.

Sincerely yours,

P.S.  
✓

The Chief Justice

Copies to the Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

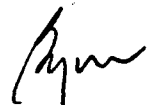
May 31, 1977

Re: No. 75-6521 - Abney v. United States

Dear Chief:

Please note that I concur in the judgment.

Sincerely,



The Chief Justice

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 26, 1977

Re: No. 75-6521, Abney v. U.S.

Dear Chief:

Please join me.

Sincerely,

*T.M.*  
T.M.

The Chief Justice

cc: The Conference



1  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 18, 1977

Re: No. 75-6521 - Abney v. United States

Dear Chief:

Please join me.

Sincerely,

*H. A. B.*

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 18, 1977

No. 75-6521 Abney v. United States

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

LFP/lab

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 19, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-6521 - Abney v. United States

During a pause in the Conference this afternoon, Potter called my attention to some of the language in Cohen v. Beneficial Loan Co. which cast doubt upon the interpretation I had placed upon it in our Conference discussion of Abney. I have now re-read the case (which I am ashamed to confess I also re-read only about ten days ago) and see that the District Court had refused to require the posting of security for costs. If this sort of order is appealable under Cohen, I think I would have to say that an order refusing to dismiss an indictment because of claimed double jeopardy would likewise be appealable. While I am no great fan of the reasoning in Cohen, I must now agree with Harry that it fits Abney "like a glove". I therefore change my vote from dismiss to affirm.

Sincerely,



✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

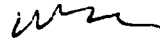
May 23, 1977

Re: No. 75-6521 - Abney v. United States

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 18, 1977

Re: 75-6521 - Abney v. United States

Dear Chief:

Please join me.

Respectfully,

A handwritten signature, likely of John Paul Stevens, consisting of a stylized 'J' followed by a 'P' and an 'S'.

The Chief Justice

Copies to the Conference